IN THE

Supreme Court of The United States

OCTOBER TERM 1970

NO. 1236

THEODORE L. SENDAK
Attorney General of
the State of Indiana,

Appellant,

v.

R. VANCE HARTKE, et al,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

APPELLANT'S BRIEF

Appellants appeal from the judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, entered on December 17, 1970, granting Appellee a preliminary injunction which continued in full force the *ex parte* temporary restraining order entered by the District Court on December 3, 1970, enjoining any action to conduct a recount in the election

for the office of United States Senator for the State of Indiana.

OPINION BELOW

The opinion of the District Court is reported and may be found in 321 F.Supp. 1370 (S.D. Ind. 1970) and in the Appendix, at p. 53.

JURISDICTION

Hartke's action for injunctive relief was brought in the District Court on December 3, 1970, pursuant to 28 U.S.C. § 1343(3) to enjoin the holding of an election recount on the ground that the Indiana election recount statutes were in conflict with the United States Constitution (Appendix p. 4). The three judge panel entered its order December 17, 1970, continuing in full force an earlier temporary restraining order granted by the District Court December 3, 1970 which enjoined the holding of the recount. (Appendix p. 50). Appellant's Notice of Appeal was filed December 18, 1970 in the District Court, Indianapolis.

This appeal was docketed in the Supreme Court on January 13, 1971 as No. 1232 and on January 15, 1971 as No. 1236. Jurisdiction was postponed on March 22, 1971, and both cases consolidated for hearing.

This Court has jurisdiction of this appeal under 28 U.S.C. § 1253.

Jurisdiction of this appeal exists notwithstanding any claims of mootness by reason of the seating of Plaintiff Hartke in the United States Senate. By unanimous consent of the Senate, Plaintiff Hartke received the oath "without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice

to the outcome of any recount that the Supreme Court might order." Congressional Record, January 21, 1971, p. S4. Plaintiff has not been seated in any final sense. Appellants submit that upon these facts there is no basis for a finding of mootness because the Senate itself has declared that Plaintiff's seating was conditional upon the outcome of this specific case.

Moreover, not conceding the issue, but assuming for purposes of argument, that the cause was moot as to the interests of Appellant Roudebush, the lower court decision that the recount statute is unconstitutional is a severable issue and still beclouds the case. Under the principles of *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 433, 31 S.Ct. 288 (1911), retention of this appeal would be proper in light of the questions of public interest involved regarding the constitutionality of the recount procedure.

Courts of appeal generally retain jurisdiction of appeals despite claims of mootness where:

1. The question is likely to arise in the future unless settled by a court of last resort;

2. The validity of a statute is in question;

3. A final determination is necessary for the guidance of public officials;

4. There is a question involving an election;

5. It would be difficult or even impossible to get a final determination of the question because the case must necessarily become moot before the appeal can be heard. 132 A.L.R. 1185, 1189-1191.

The decision of this Court in *Powell v. McCormack*, 395 U.S. 486 (1969) supports the viability of this cause. There

it was held that Powell's claim to membership in the 90th Congress was not moot, despite the fact that the 90th session of Congress had terminated and Powell had actually been seated in the 91st Congress before this Court could hear the case.

The State of Indiana requires a final decision as to the constitutionality of its recount statute for the guidance of public officials in future elections. This is an issue of public importance aside from the rights of Appellant Roudebush to a recount of the votes. The District Court decision, if not reviewed, will cast doubt as to the proper course for election officials to follow in future elections.

QUESTIONS PRESENTED

1. Whether the District Court was prohibited from enjoining the recount proceeding in the state court by 28 U.S.C. § 2283.

2. Whether the Indiana Election Code providing for a recount in elections for the office of United States Senator conflicts with the constitutional prerogative of the Senate to judge the elections of its members, thereby prohibiting a recount in this case.

STATUTES INVOLVED

28 U.S.C. § 2283 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment".

The United States Constitution, Article I, Section 4 provides:

> "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof . . ."

The United States Constitution, Article I, Section 5 provides:

> "Each house shall be the judge of the elections, returns and qualifications of its own members, . . ."

The Indiana Election Code, Acts of 1945, ch. 208, §§ 324 to 340, as found in Burns' (1969 Repl.), §§ 29-5401 to 5417 provides:

> "Any candidate for any public officer voted upon at any election held within the State of Indiana shall have the right to have the votes cast for the office for which he was a candidate recounted in any voting precinct or precincts in any county or counties, as the case may be, under the conditions and in the manner and with the effect as in this article provided." Acts 1945, ch. 208, § 324; Burns' § 29-5401

Burns' (1969 Repl.), § 29-5414 provides for the legal effect of a recount:

> "When such recount is completed by the commission it shall make and sign its certificate showing the total number of votes received in such precinct or precincts by each candidate for such office or offices and state therein who received the highest number of votes in such precinct or precincts for such office or offices and by what plurality, and shall file the same with the clerk of the circuit court. The clerk shall enter such certificate in the order book of such court. Except for the offices of governor, lieutenant-governor, and members of the general assembly, such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; and certified copies of such recount certificates shall be prima facie evidence of the votes cast for such office or offices in such precinct or precincts in any

contest or other preceeding [proceeding] in which there is an issue as to the votes cast at such election for such office or offices."

The 1961 amendment to § 5414 provides:

"The said certified statements of the clerks of the circuit courts shall not be construed as determining the eligibility of a candidate for office, but shall be prepared and transmitted as herein provided for the purpose of referring the information therein contained to the appropriate authorities. [Acts 1945, ch. 208, § 337, p. 680; 1961, ch. 313, § 4, p. 861.]"

STATEMENT OF THE CASE

On November 3, 1970, an election was held in the State of Indiana for the office of United States Senator. It was the closest senatorial election in Indiana history. The reported plurality was about one vote per precinct statewide. (4,383 votes; 4,440 precincts). Candidate Richard L. Roudebush petitioned the Marion County Superior Court for a recount in various enumerated precincts. (Appendix p. 8). Hartke moved to dismiss Roudebush's petition, but the motion was denied and the petition for a recount of the votes was granted. (Appendix p. 24).

Plaintiff-Appellee Hartke then filed in the U. S. District Court for Southern Indiana his Complaint for Injunctive Relief and Application for Temporary Restraining Order seeking to restrain operation of the recount statutes on the ground that they were in conflict with Article I, Section 5 of the United States Constitution. (Appendix p. 4). The same day Hartke's action in the District Court was filed, December 3, 1970, the judge granted the Temporary Restraining Order enjoining the defendant members of the recount commission from further proceeding. (Appendix p. 31).

On December 14, 1970, the Attorney General of Indiana moved to intervene as a party defendant pursuant to Rule 24, F.R.C.P., in order to defend the constitutionality of the Indiana Election Code recount provisions and subsequently moved the District Court to dismiss Hartke's complaint. (Appendix p. 44). On December 15, 1970, the District Court granted the Attorney General's motion to intervene as a party defendant. (Appendix p. 46).

On December 17, 1970, the District Court composed of a three judge panel convened to hear Hartke's application for injunction based upon the alleged unconstitutionality of the Indiana election recount statutes. The District Court determined the statutes to be unconstitutional with respect to the office of United States Senator. The District Court further found that to proceed with a recount "would work irreparable injury to the Plaintiff in that such action would compromise the integrity of the ballots, tally sheets, voting machines, and other paraphernalia of the election . . ." and ordered that the defendants and all those in active concert with them be enjoined from taking any action whatsoever pursuant to the provisions of Burns' (1969 Repl.) §§ 29-5401 to § 29-5417 to conduct a recount. (Appendix p. 51).

The Indiana Attorney General petitioned the District Court to stay its interlocutory order, but petition was denied December 18, 1970. The Attorney General then applied to this Court for a stay of the District Court order on December 18, 1970. This application was denied. (Appendix p. 72).

ARGUMENT

I

A. SECTION 28 U.S.C. 2283 PROHIBITED THE INJUNCTION GRANTED BY THE DISTRICT COURT

The injunction restraining the operation of the recount statutes was granted in contravention of 28 U.S.C. § 2283 which provides:

> "A Court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments".

Despite the mandatory language, the District Court found this statute to be "a statutory adoption of the doctrine of comity and hence discretionary in its application". (Appendix p. 57). Citing *Baines v. City of Danville* (4 Cir. 1964), 337 F.2d 579, the Court said that "special circumstances" justifying relief would allow a federal court to enjoin state court proceedings, despite what the Court acknowledged as the "absolute language" of § 2283. (Appendix p. 57). In *Baines,* it was noted that § 2283 was derived from the Act of March 2, 1793, 1 Stat. 335, which simply provided that no injunctions should issue from federal courts to stay proceedings in any state court. In 1948, the section was amended to include the provision for the three exceptions to its operation. In *Amalgamated Clothing Workers of America v. Richman Brothers Co.* 348 U.S. 511, 514, 75 S.Ct. 452, 99 L.Ed. 600, (1955), the

Supreme Court said "by the enactment (the revision which is now § 2283), Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation". In *Baines*, the Court of Appeals said:

> "In every case before the Supreme Court in which federal interference with state court proceedings has been premised upon asserted denials of civil rights, the Supreme Court has required or sanctioned federal forbearance. It has usually done so on the basis of considerations of equity and comity fashioned by it, but which are identical with those which underlie the statute. If judicial principles of equity and comity prevent federal stay of criminal proceedings in a state court, it is difficult to see how an unqualified congressional command to the same end can be ignored". 337 F.2d at p. 591.

Also in *Baines*, the court carefully decided that 42 U.S.C. § 1983, the civil rights statute, which provided for injunctive relief, did not make an exception to § 2283. Yet, reversing the tenor of its preliminary discussion, the Fourth Circuit commenced to fashion its own rule that § 2283 is inapplicable in cases where an injunction against state court proceedings is the only means of avoiding "grave and irreparable injury". This conclusion was buttressed by a theory of expedience: "Judicially fashioned rules are more malleable". 337 F.2d at p. 593. However, upon the facts in that case the Fourth Circuit held that injunctive interference with the state court proceedings was not warranted.

Baines is readily distinguishable from this case, for *Baines* involved a violation of the First Amendment rights of the Negro plaintiffs. The instant case involved no such claim under the Civil Rights Act.

While § 2283 does not bar federal injunctions against the *institution* of state court proceedings, *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 116, 14 L.Ed.2d 22 (1965), it bars all stays of proceedings already instituted unless one of the three statutory exceptions applies. The first exception in § 2283 is for cases where Congress has expressly authorized the federal courts to enjoin state court proceedings. (Therefore cases using 42 U.S.C. § 1983 to carve out exceptions to § 2283 are not in point because Plaintiff makes no claim under § 1983.) He is not proceeding under the Bankruptcy Act, in habeas corpus, or in removal. He seeks no injunction "expressly authorized by Act of Congress". His only claim to jurisdiction is under 28 U.S.C. § 1343 (3) which provides:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> • • • • •
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> (3) To redress the deprivation, under color or any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States: • • • • •"

This statute does not provide Hartke with an express authorization for the injunction. Nor is Hartke able to bring himself within the second exception allowing injunctions "where necessary in aid of (the federal court's) jurisdiction". The third and final exception in § 2283 permits federal injunctions against state court proceedings "to protect or effectuate its judgments". There has been no judgment justifying protection and conferring injunctive powers in this case. Thus, none of the statutory exceptions to § 2283 is available to Hartke. The District

Court's avoidance of § 2283 is justified only upon its theory that "special circumstances justify such relief . . ." Here there is no such justification.

The District Court clearly adopted the "special circumstances" test as to whether § 2283 should be avoided. The court rejected the theory of *Cooper v. Hutchison,* 184 F.2d 119 (3 Cir. 1950), that 42 U.S.C. § 1983 created an exception to § 2283 in granting the injunctive power to federal courts in civil rights cases. The *Baines* case is the only authority cited by the District Court for its "special circumstances" test of the applicability of § 2283.

The District Court stated that abstention would not be proper where the state statute was clearly unconstitutional and incapable of a limiting construction. It cited *Harman v. Forsevius,* 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50, *Baggett v. Bullitt,* 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed. 2d 377 and others. But none of these cases involved § 2283 and its anti-injunctive imperatives. The cases cited were appropriate where abstention, as a general desideratum, was purely discretionary and not compelled, as here, by an act of Congress. The cases are inapposite here, because the abstention of the District Court is compelled by statute. In the cases cited, no pending state court proceeding was enjoined. Bereft of these cases not involving § 2283 and bereft of the *Baines* case, which involved a Civil Rights Act claim, the District Court's decision is an unsupportable extension of federal jurisdiction.

In *Amalgamated Clothing Workers of America v. The Richman Brothers,* 348 U.S. 511, 75 S.Ct. 452, the Supreme Court considered a case where an employer had brought an action in a state court against a union which had been picketing its business outlets. The union then sought an

injunction in a federal court to prevent the employer from pursuing his remedy in the state court, claiming that the state court had no jurisdiction over the labor dispute. The Supreme Court, assuming that the state court had no jurisdiction, held that a federal injunction was prohibited by § 2283. It had been argued that § 2283 was inapplicable whenever it appeared that the state court was wholly without jurisdiction to proceed, the field having been preexempted by Congress. (This contention parallels the District Court's theory of "special circumstances" nullifying § 2283.) To this theory the Supreme Court replied:

> "This is not a statute conveying a broad general policy for appropriate *ad hoc* appliction. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions". 348 U.S. 515, 75 S.Ct. 455.

Against this clearly imperative language of the Supreme Court, the District Court in this case countered with the view that § 2283 was "discretionary in its application". (App. p. 57)

Subsequent to *Amalgamated*, this Court held in *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 116, 14 L.Ed.2d 22 (1965) that it was proper for a federal court to enjoin the bringing of a state criminal proceeding where the threatened prosecution of the criminal statute would have a "chilling effect" on free speech, which would constitute an irreparable injury to the plaintiff. But *Dombrowski* did not involve § 2283 because the state court proceeding was enjoined before it had even begun, and § 2283 prohibits only injunctions against pending state court proceedings. Because § 2283 was not applicable in *Dombrowski*, that case is of no aid to Plaintiff here.

Following *Dombrowski,* several lower federal courts have held that federal injunctive relief is warranted even where state court proceedings are pending *if* First Amendment rights are involved. Before it can be said that "special circumstances" exist which would enable a federal court to avoid § 2283, First Amendment rights must be involved. Moreover, the institution of the state court proceeding must be for the designed purpose of "chilling the First Amendment right". See eg., *Landry v. Daley,* 288 F.Supp. 200 (N.D. Ill. 1968) Federal intervention is not justified unless it is shown that enforcement of the state statute is being carried out in bad faith to harass an individual's exercise of protected freedoms. *Cameron v. Johnson,* 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed. 2d 182 (1968); *Landry v. Daley, supra.* In *Cameron,* this Court said:

> "Appellants case that there are 'special circumstances' establishing irreparable injury sufficient to justify federal intervention must therefore come down to the proposition that the statute was enforced against them, not because the Mississippi officials in good faith regarded the picketing as violating the statute, but in bad faith as harassing appellants' exercise of protected expression with no intention of pressing the charges or with no expectation of obtaining convictions, knowing that appellants' conduct did not violate the statute. We agree with the District Court that the record does not establish the bad faith charged. This is therefore not a case in which '. . . a federal court of equity by withdrawing the determination of guilty from the state courts could rightly afford (Appellants) any protection which they could not secure by prompt trial and appeal pursued to this Court'. *Douglas v. City of Jeanette,* 319 U.S. at 164, 63 S.Ct. at 881"; 390 U.S. at 619, 88 S.Ct. at 1340.

There has been no allegation of bad faith in the attempted recount procedure, nor could there be. There has been no allegation of a denial of First Amendment rights. There is no way § 2283 can be avoided under the facts of this case. The facts of this case do not constitute a *Dombrowski* exigency.

The decision of this Court in *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 90 S.Ct. 1739 (1970), is dispositive. There the union sought an injunction in federal court against enforcement of a state court injunction prohibiting union picketing. There it was noted that the underlying rationale of the anti-injunction statute was to prevent needless rivalry between the federal and state court systems whereby "litigants who foresaw the possibility of more favorable treatment in one or the other system would predictably hasten to invoke the powers of whichever court it was believed would present the best chance of success." 90 S.Ct. at 1743. As did the respondent in the *Atlantic Coast* case, the District Court "has intimated that the Act only establishes a 'principle of comity,' not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. We cannot accept any such contention." 90 S.Ct. at 1743. In *Atlantic Coast* this Court affirmed its previous decision in *Amalgamated Clothing Workers.* In *Atlantic Coast* this Court held

> "that any injunction against state court proceedings *otherwise proper under general equitable principles* must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. Moreover since the statutory prohibition against such injunc-

> tions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." 90 S.Ct., at p. 1743 (emphasis added)

Further, this Court stated that "any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." 90 S.Ct. at 1748. In view of the *Amalgamated* and *Atlantic Coast* decisions, doubt as to the propriety of the injunction issued below is misplaced; the impropriety of the injunction is certain. Had the District Court entertained any doubt, it should have resolved its doubts in favor of abstention.

As the Court noted in *Atlantic Coast,* an injunction "otherwise proper under general equitable principles" must comply with § 2283 if it is to be upheld. The object of the next argument is to show that the grounds of equitable jurisdiction were not met in this case, aside from the prohibition of § 2283.

B. THERE IS NO IRREPARABLE DAMAGE JUSTIFYING AN INJUNCTION

At the time the District Court granted its injunction to Hartke, he was not threatened with irreparable damage by the recount proceeding pending in the Marion Superior Court. It is the general rule that "state officers may be enjoined, but only in a case reasonably free from doubt, and only if irreparable injury would result from the acts sought to be restrained . . . Injunction should not be

granted where other adequate remedies are available." 1 Barron and Holtzoff, Federal Practice and Procedure, § 46, p. 236-7; see also *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 116 (1965); *Younger v. Harris*, 91 S.Ct. 746 (1971).

Plaintiff had available adequate remedies other than a federal injunction. Yet the District Court expressed its belief that the case law of Indiana fully supported its holding that the recount statute was unconstitutional. If that were true, Plaintiff could have applied to the Indiana Supreme Court for a writ of prohibition.

The three Indiana cases cited by the District Court as supporting Hartke's case all involved applications for writs of prohibition.

> *State ex rel Acker, et al v. Reeves*, 229 Ind. 126, 95 N.E.2d 838 (1951);
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> *State ex rel Beaman v. Circuit Court of Pike County, et al*, 229 Ind. 126, 95 N.E.2d 838 (1951);
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> *State ex rel Batchelet v. Dekalb Circuit Court, et al*, 248 Ind. 481, 229 N.E.2d 798 (1967).

The Plaintiff Hartke could easily have done likewise and secured a speedy remedy in prohibition. In *Dombrowski*, federal intervention was premised upon facts where it was certain the plaintiffs would *not* be able to vindicate their First Amendment rights in the state courts. It was said:

> ". . . a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury." 38 U.S. at 486, 88 S.Ct. at 1120.

But in the instant case, Hartke has a clear, quick remedy in the Indiana Supreme Court by writ of prohibition and alleges ample state authority for his constitutional claim.

The District Court expressed its belief that "like Humpty Dumpty, the seals on the ballots cannot be put back together again, if once destroyed, hence the frequent reason given for abstention—that all can be made right through state appellate procedures—does not apply". Yet all *can* be made right through state appellate procedures, procedures which the District Court did not recognize. This Court has previously written:

> "'The assumption upon which the argument proceeds is that federal rights will not be adequately protected in the state courts, and the "gap" complained of is impatience with the appellate process if state courts go wrong. But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. With limited exceptions, it was not until 1875 that the lower federal courts were given general jurisdiction over federal questions. During that entire period, the vindication of federal rights depended upon the procedure which petitioner attacks as so grossly inadequate that it could not have been contemplated by Congress. The prohibition of § 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts." *Amalgamated,* 348 U.S. 511, at 518, 75 S.Ct. 452 at 456.

In addition to the state case law which the District Court said favored Plaintiff, the recount statute provides for the maintenance of the integrity of the ballots:

> "The court shall by order impound, and provide for the protection of all ballots and voting machines used at such election for casting votes for such office or offices in such precinct or precincts, together with all tally sheets relating thereto and all lists of the names and addresses of all persons registered by the clerk as having voted for such office or offices, and shall make the same available to said recount commission or to any contest commission appointed pursuant to section 351(a)(b) and (c) of this act." Acts 1945, ch. 208, § 336, amended, Burns' (1969 Repl.) § 29-5413.

Moreover, Burns' (1969 Repl.) § 29-5411 provides that "each candidate affected by such recount shall be entitled to have a watcher present at such recount and shall himself have the right to be present," and that "representatives of the press shall also be entitled to attend such recount." The conclusion of the District Court that a recount proceeding would wreak irreparable harm upon Hartke is not supported in logic, law, or fact.

As *Younger v. Harris* noted, there is a "national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." 91 S.Ct., at 749. These special circumstances will be found only where there is the threat of irreparable injury "both great and immediate." 91 S.Ct., at 751. While *Younger* was a criminal case, Appellants submit that its holding, 91 S.Ct. 755, "that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief" applies equally well to this case. As the dissenting opinion in *Perez v. Ledesma,* 91 S.Ct. 674 (1971) noted, at 699, "moreover, unlike the tax statutes, § 2283 is not directed to any particular class of

litigation, criminal or otherwise, but is designed to protect the process of orderly state adjudication generally."

Thus the latest pronouncements of this Court indicate that irreparable injury remains a requisite of the federal injunctive power.

The irreparable injury discussed most often in the injunction cases is that of a threat to First Amendment rights. However, no such threat is present in this case. The threat to First Amendment rights is usually discussed in a factual context of bad faith on the part of state officials and harrassment. But, nothing of the sort is present in this case. There is no irreparable injury of the *Dombrowski* genre involved.

The injunction was improperly granted by reason of the failure of Plaintiff Hartke to show irreparable harm of the "great and immediate" type which is required to overcome the long-standing policy against federal injunctions which halt orderly proceedings pending in state courts.

II

THE INDIANA RECOUNT LAW IS CONSTITUTIONAL

While Article I, Section 5 of the Constitution establishes each house as the judge of the elections of its members, Article I, Section 4 provides that "(t)he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof. . ." Appellants submit that the Indiana recount statute is a valid exercise of the power of the States to provide for the manner of holding elections. The Indiana recount statute is an integral part of the election process.

A recount stands on no different footing than the original count. If a recount is invalid as a derogation of the Senate's prerogatives, so is the original count. Were an original count proscribed, the Senate would have to appoint a staff of thousands to conduct the original count of the votes on the theory that the original count, if conducted by the States, would be in derogation of its right to be the judge of the elections of its members. But that is not the case. The original count is not considered as an infringement upon the Senate's right; neither should be the recount. Article I, Section 5 clearly vests the Senate with the *last* voice. All a recount can do is to verify the vote tally. It is a discovery procedure. The Senate can make whatever use of the tally it so desires.

Any "judgment calls" exercised by the members of the recount commission, as to paper ballots would be no more objectionable than the judgments made by the election officials on the first vote count. A recount serves as an integral part of the counting of the ballots and is merely part of the "manner" of holding the election, as provided for in Article I, Section 4.

Hartke has proposed that if a recount is invalid as to elections for seats in the state legislature, it is also invalid for the office of United States Senator. Under this reasoning, the 1961 amendment to § 29-5414, which made the results of a recount effective only to *refer* information to the appropriate authorities in recounts for the general assembly, should also apply to recounts for the Senate. Under the amendment to § 5414, recounts for the Senate should be accepted the same as state legislature recounts and the results of the recount would be of informational value only. There is no way that such a provision can derogate from the prerogatives of the Senate. In any

event, the Senate will still have the final decision in the matter, Under Article I, Section 5.

Even without the 1961 amendment adding the last paragraph to § 5414, the effect of the recount commission certificate is only "prima facie evidence of the votes cast for such office"; the Senate still would retain the power to judge for itself the elections of its members. Therefore, there is no conflict between the Indiana recount statute and Article I, Section 5 of the Constitution.

Appellant's position in this regard has received recent support in *Blackburn v. Hall,* 115 Ga.App. 235, 154 S.E.2d 392 (1967); *Wickersham v. State Election Board,* Okl., 357 P.2d 421, (1960) and *Odegard v. Olson,* 264 Minn. 439, 119 N.W.2d 717 (1963).

Of the three Indiana cases principally relied upon by the District Court, the first two, *State ex rel Acker et al v. Reeves,* 229 Ind. 126, 95 N.E.2d, 838 (1951) and *State ex rel Beaman v. Circuit Court of Pike County et al,* 229 Ind. 190, 96 N.E.2d 671 (1951), both concerned elections for the state legislature, not the United States Senate. Moreover, they were decided prior to the 1961 amendment to § 29-5414, which explicitly limited the office of the recount to that of an informative function and nothing more. The one case decided after the passage of the amendment, *State ex rel Batchelet v. Dekalb Circuit Court et al,* 248 Ind. 481, 229 N.E.2d 798 (1967) contained such a short opinion that it by no means affords Hartke the support claimed by the District Court. Moreover, in *Batchelet* it was decided that the case was moot.

It should also be noted that the conclusive effects claimed for *Acker* and *Beaman* are undercut by two cases decided the same year which held that the duties of the

recount commission are ministerial and the certificate of the recount commission is not an adjudication of the title to the office. *State ex rel McCormick v. Knox Superior Court*, 229 Ind. 118, 95 N.E.2d 829 (1951). A recount is in the nature of a bill of discovery. *Brown v. Grzeskowiak* 230 Ind. 110, 101 N.E.2d 639 (1951).

A recount should be distinguished from an election contest proceeding, which is provided for by separate statute. See Burns' (1969 Repl.) § 29-5501 to 5617. An election contest proceeding is more in the nature of an adjudication of title to the office contested. Those laws of Indiana which provide for election contests on the basis of irregularity, ineligibility, illegal votes, etc. exclude contests for Congressional seats. Burns' § 29-5601. Whatever the conflict between an election contest and Article I, Section 5 may be, there is no conflict as to a mere recount proceeding. Yet the District Court opinion erroneously uses the terms interchangeably (Appendix p. 58, 59) which further demonstrates the desirability of having this question of state law decided by a state court.

To summarize, the District Court erred because it granted an injunction prohibited by 28 U.S.C. § 2283 in a case which does not come within the exceptions to the anti-injunction rule, a rule which is based on settled principles of federalism. In addition, the injunction should not have been issued for the reason that Hartke would not have suffered irreparable harm had the recount proceeded. Also, the Plaintiff had a clear, speedy remedy at law in the state courts of Indiana by writ of prohibition. Finally, Hartke stated no claim justifying relief: a recount does not detract from the ultimate right of the United States Senate to judge the elections of its members. The Senate has the last word, and nothing in the Indiana

recount statute impairs the right of the Senate. The Indiana recount statute is constitutional.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the decision and order of the District Court should be reversed.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

WILLIAM F. THOMPSON
Assistant Attorney General

MARK PEDEN
Deputy Attorney General

Attorneys for Appellant

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

~~No. 1232~~ 70-66

RICHARD L. ROUDEBUSH,

Appellant,

vs.

R. VANCE HARTKE, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER AND THEODORE L. SENDAK, ATTORNEY GENERAL OF INDIANA,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

BRIEF FOR APPELLANT.

DONALD A. SCHABEL,
111 Monument Circle,
Indianapolis, Indiana 46204,
Attorney for Appellant.

L. KEITH BULEN,
CHARLES G. CASTOR,
One Indiana Square,
Indianapolis, Indiana 46204,

JOHN G. TINDER,
620 Union Federal Building,
Indianapolis, Indiana 46204,
Of Counsel.

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OPINIONS BELOW.

The majority opinion of District Judges Steckler and Dillin (A. 53-68) and the dissenting opinion of Circuit Judge Stevens (A. 69-71) are reported at 321 F. Supp. 1370.